

MARK J. ROMEO (Bar # 112002)  
LAW OFFICES OF MARK J. ROMEO  
235 Montgomery Street, Suite 400  
San Francisco, CA 94104  
Telephone: (415) 395-9315  
Facsimile: (415) 288 9755  
*romeolaw@msn.com*

Attorneys for MF Fund III, LP

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re WAUKEEN MCCOY,  
  
Debtor.

Bk. No. 14-30381 HLB  
Chapter 11 (Converted from Ch. 13)  
MOTION FOR RELIEF FROM  
STAY; SUPPORTING FACTS AND  
MEMORANDUM OF POINTS AND  
AUTHORITIES  
Date: October 20, 2014  
Time: 2:00 p.m  
Court: Judge Blumenstiel  
US Bankruptcy Court  
235 Pine St., 23d Fl.  
San Francisco CA 94104

TO THE UNITED STATES BANKRUPTCY COURT, THE DEBTOR, AND ALL OTHER  
INTERESTED PARTIES:

1. MF Fund III, LP ( "Movant") hereby moves the Court for relief from the  
automatic stay presently in effect in this case as follows:

1) To File a Motion to Expunge A Notice of Pending Action recorded against  
Movant's real property located at 21 Buena Vista Park East, San Francisco, California 94117,  
(the "Property") and more fully described in the motion; and taking any other actions to clear  
title to the Property against invalid claims of the Debtor, in the action which the Notice was  
recorded, or any other proceeding now existing or hereafter filed;

1           2)       Seeking the liquidation and award of attorneys fees and costs against Debtor in  
2 any Motion to Expunge and leave of this Court to file such award as an administrative or other  
3 claim in this case and regardless of any Bar Date in effect.

4       Movant will further request that the order of the Court be effective in this case and in any  
5 conversion of this case to another chapter without necessity of another motion and that the  
6 order be effective immediately, notwithstanding Bankruptcy Rule 4001(a)(3).

7           2.       This motion is made pursuant to 11 U.S.C. sections 362(d)(1) and (2) on the  
8 grounds that:

9           a.       Cause exists for relief from the automatic stay because this Court has already  
10 granted relief as to the secured claim of Kenneth Page and Buena Vista Park, LLC on their  
11 motion for relief from stay (“the Page Motion”) to foreclose on the Property which is the  
12 subject of the Notice of Pending Action, and it was subsequently foreclosed as to Debtor’s  
13 interest and possession, so Debtor has no interest in the Property for the stay to protect;

14           b.       The prior order of the Court on the Page Motion precludes application of  
15 the stay as to any claims to the Property or the maintenance of the state court action as one  
16 supporting an interest of the estate, whether as real property, or as personal property as a claim  
17 held by the Debtor;

18           c.       Expungement of the Notice of Pending Action is a proceeding specifically and  
19 exclusively under the jurisdiction of the Court in which the action is pending so that this Court  
20 cannot provide a remedy and should abstain in favor of the State Court;

21           d.       The Notice of Pending Action and underlying claims were taken against Movant  
22 who is a total stranger to the estate and the debtor, and such claims are not necessary to the  
23 reorganization of the Debtor because they are speculative and burdensome to the estate

24                               **Factual Allegations in Support of Motion**

25           3.       Debtor is an unmarried individual and commenced this case on March 12, 2014  
26 under Chapter 13 of the Bankruptcy Code. On May 21, 2014, Debtor moved to convert this case  
27 to Chapter 11, which was granted.

28           4.       The Movant is a California limited partnership based in San Francisco,

1 California. Movant has no personal, legal or professional or financial relationship with Kenneth  
2 Page or Buena Vista Park, LLC, the holders of the Note that was foreclosed upon. Movant is  
3 the sole and exclusive owner of the Property by virtue of a Trustees Deed Upon Sale. (Decl. Of  
4 Craig Lipton, [hereafter “Lipton”] ¶1).

5 5. When Debtor filed this proceeding he listed his ownership of the Property on  
6 Schedule A and subsequently Amended Schedule A. (Docket # 61, p. 1).

7 6. In his Amended Schedule B, Debtor lists a claim against Kenneth Page and  
8 Buena Vista Park, LLC as a personal property interest, referencing a case pending in the San  
9 Francisco Superior Court, McCoy v. Page, et al. (Exhibit 1, p. 2).

10 7. After the Page Motion was heard, the court granted those Movants relief from  
11 stay to foreclose on their secured note on the Property and to recover possession of the Property  
12 post-foreclosure by Order entered on June 24, 2014 (the “Page Order”). (Exhibit 2).

13 8. After the Page Order was entered, the holders of the Note caused a non-judicial  
14 sale to be conducted of the Property on August 7, 2014. There were multiple bidders at the sale  
15 and the Property sold for higher than the full credit bid made by Page and Buena Vista Park,  
16 LLC. Movant was the successful bidder at the sale and paid \$1,200,000, and took title to the  
17 Property subject to the Capital One first loan. (Lipton, ¶ 3 and Exhibit 3). A Trustees Deed  
18 Upon Sale was delivered to Movant and recorded in Official Records, San Francisco, California  
19 on August 13, 2014. (Exhibit 3).

20 9. After the sale, Movant expended substantial amounts in cleaning, repairing  
21 renovating and staging the Property for resale and placed it on the market. Movant received an  
22 offer from a party to purchase the Property and the Property is presently in contract in a pending  
23 escrow. (Lipton, ¶ 4).

24 10. While the Property was being marketed, Debtor recorded a “NOTICE OF  
25 PENDANCY [SIC] OF ACTION” (the “Notice”) against the Property in one of his pending  
26 cases in San Francisco Superior Court, McCoy v. Page, et al. No. CGC 11-512599. (Lipton, ¶ 5  
27 and Exhibit 4). The Notice refers to the same action that was detailed to the Court in the Page  
28 Motion as “McCoy 2.” (Docket No. 32, p. 4, ¶ 14). Movant is not a party to McCoy 2 or the

1 companion lawsuit, McCoy v. Page, et al. San Francisco Superior Court No. 1CGC 10-501448  
2 (referred to as McCoy1 in the Page Motion). The two lawsuits are those referred to in Amended  
3 Schedule B and Debtor purports to hold these as Property of the estate.<sup>1</sup>

4 11. The Notice prevents Movant from completing the sale to the third party buyer.  
5 Neither Movant nor such buyer have any connection with the Debtor, or with the prior holders  
6 of the Note that was foreclosed. Movant is threatened with loss of the sale, the threat of a claim  
7 for damages from the buyer and continuing loss due to the inability to sell or refinance the  
8 Property. Movant has informally requested release from Joe Angelo, Debtor's counsel herein,  
9 but that has not been forthcoming. (Lipton, ¶ 6). If Movant files a Motion to Expunge the  
10 Notice of Pending Action without seeking relief here, it is likely that Debtor will maintain to  
11 the state court that such Motion is a violation of the automatic stay, causing even more delay.

12 12. The Relief From Stay Cover Sheet is incorporated herein.

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 13. This motion is made pursuant to 11 U.S.C. section 362(d)(1) and (2) for cause,  
15 on the grounds that there is no equity or interest in the Property and it is not necessary for  
16 reorganization in this case. "Cause" under 11 U.S.C. 362(d)(1) is a broad and flexible concept  
17 which permits a court to respond to inherently fact-driven situation. (In re A Partners, LLC 344  
18 BR 114, 127 (ED Cal. 2006).

19 14. First, there can be no real property interest protectable by the stay in this case. .  
20 This Court already issued an order for relief for the foreclosure of the Property to go forward,  
21 and for the holders to recover possession of the Property. In California, a Notice of Pending  
22 Action can only be recorded in cases in which a "real property claim" which is one that seeks or  
23 affects title to or possession of real property. (CCP §§ 405.4; 405.20). The Page Order for  
24 Relief was entered on June 25, 2014 and the appeal period under Bankruptcy Rule 8001(a) has  
25 long since expired. That order is final, non-appealable and binding.

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27 <sup>1</sup> When Page filed his motion to enforce the settlement in San Francisco Superior Court, which is still  
28 pending, Debtor appeared in McCoy 1 in pro per, and then subsequently employed the law firm of Smith-Patten in  
San Francisco to represent him in at least McCoy 1. The docket in this case does not reflect any application for  
approval to employ these lawyers for the Debtor in Possession. (Lipton, ¶ 7)

1           15. Federal courts use different terms to refer to res judicata and collateral estoppel  
2 concepts. They say that res judicata includes two distinct types of preclusion: claim preclusion  
3 and issue preclusion. (Robi v. Five Platters, Inc. 838 F2 318, 321 (9th Cir. 1988). Claim  
4 preclusion "treats a judgment, once rendered, as the full measure of relief to be accorded  
5 between the same parties on the same claim." (Id.). Issue preclusion "prevents re-litigation of  
6 all "issues of fact or law that were actually litigated and necessarily decided in a prior  
7 proceeding." (Id. at 322); Gilldorn Savings Assn v. Commerce Savings Assn. 804 F2 390,  
8 394-395 (7th Cir. 1987). The Debtor is judicially precluded by the Order on the Page Motion  
9 from raising the stay in protection of a "real property claim."

10           16. The same order and issues would bar Debtor from asserting the stay in  
11 protection of his Schedule B interest in the McCoy1 and McCoy2 suits. Movant was an  
12 unrelated third party bidder at the sale. The California courts have made it very clear that a third  
13 party purchaser at a sale is a bona fide purchaser. By statute, this presumption of a regular sale  
14 recited in a recorded Deed of Trust Upon Sale is **conclusive** in favor of a bona fide purchaser.  
15 (Civil Code Section 2924). As the court stated in 6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.  
16 (2001) 85 CA4 1279, 1286:

17           Aside from the common law presumption of validity..., Civil Code section 2924  
18 contains a statutory presumption "aris[ing] from the recital in the trustee's deed  
19 that all statutory requirements for notice of default and sale have been satisfied.  
20 This presumption is prima facie evidence of compliance and **conclusive**  
21 evidence of compliance in favor of a bona fide purchaser or encumbrancer."...

22 (Emphasis original). The conclusive presumption under Civil Code § 2924 is one "that  
23 *requires* the trier of fact to find that the presumed fact exists" from a finding of the existence of  
24 the basic fact. The presumption is conclusive "because the adverse party against whom it  
25 operates *is not permitted* to introduce evidence to contradict or rebut the existence of the  
26 presumed fact." (Wolfe v. Lipsey (1985) 163 CA3 633, 639-640 (Italics in original). If such  
27 presumption applies, the sale is properly conducted for all purposes between the trustor and the  
28 bona fide purchaser, and constitutes a final adjudication of the rights of the borrower and  
lender. (Smith v. Allen (1968) 68 C2 93, 96; Moeller v. Lien (1994) 25 CA4 822, 830-833;

1 Vella v. Hudgins (1977) 20 C3 251, 255). Movant is a total stranger to the debtor and the estate  
2 and is not a party, nor could it be, to the action which Debtor recorded notice of in the Notice.

3 17. Furthermore, it would appear that the validity of the Notice can only be resolved  
4 in San Francisco Superior Court, since a motion to expunge must be filed by a party or affected  
5 non-party in the action that is pending. (CCP § 405.30). Jurisdictionally, this court does not  
6 appear to be able to render a remedy or even determine the motion for Movant, nor for that  
7 matter, the Debtor in possession.

8 18. Stay relief is also justified where a movant seeks to litigate questions that are  
9 more appropriately addressed in the state courts. Where there is a pending civil proceeding  
10 involving the debtor and non-debtor parties, it has been held that the litigants can request relief  
11 from or modification of the stay in order to maintain an action in the original forum, and that  
12 such circumstances can be “cause” under 11 U.S.C. 362(d)(1). As the court in In re Santa Clara  
13 County Fair Association 180 BR 564, 566 (9<sup>th</sup> Cir. BAP 1995) noted:

14 Although “cause” is not defined by the Code, in circumstances where a claimant  
15 against the debtor estate has sought relief from the stay to pursue a cause of  
16 action in a non-bankruptcy forum, Congress has stated:

17 It will often be more appropriate to permit proceedings to continue in their place  
18 of origin, when no great prejudice to the bankruptcy estate would result, in order  
19 to leave the parties to their chosen forum and to relieve the bankruptcy court  
20 from many duties that may be handled elsewhere.

21 S. Rep. No. 989, 95th Cong., 2d Sess. 50, *reprinted in* 1978 U.S.C.C.A.N. 5836.  
22 (180 BR at 566; (modifying stay to permit discrimination action to proceed in district court); In re  
23 UNR Industries, Inc. 54 BR 266, 269 (Bk N.D. Ill. 1985). Also favoring relief is the presence of  
24 multiple non-debtor defendant parties, the claims of which do not have any independent  
25 jurisdictional basis for the bankruptcy court. (In Re Pharmakinetics Laboratories, Inc. 139 BR  
26 350, 352-353 (Bk. D. Md. 1992). In a case involving personal injury torts, the court in this district  
27 also permitted such claims to remain and be liquidated in state courts in Pacific Gas & Electric  
28 Company 279 BR 561 (Bk. N.D. Cal. 2002)(relying on the function of discretionary abstention  
under 28 U.S.C. ¶1334 ( c)(1) and (2)).

19. Movant is further entitled to relief to seek liquidation and award of attorneys fees  
under the expungement statutes, and to present such an award as an administrative or other claim

1 in this case. (CCP §405.38).

2 20. Based on the foregoing, there is cause for relief from the automatic stay in this case.

3 21. Movant requests termination of the stay effective in this action, and any conversions  
4 to any other chapter of the United States Bankruptcy Code and that the order be effective  
5 immediately, notwithstanding Bankruptcy Rule 4001(a)(3).

6 WHEREFORE, MOVANT PRAYS FOR RELIEF AS FOLLOWS:

7 1. Relief from the Automatic Stay for Filing a Motion to Expunge A Notice of  
8 Pending Action recorded against Movant's real property located at 21 Buena Vista Park East, San  
9 Francisco, California 94117 and taking any other actions to clear title to the Property against  
10 invalid claims of the Debtor, in the action which the Notice was recorded, or any other proceeding  
11 now existing or hereafter filed;

12 2. Seeking the liquidation and award of attorneys fees and costs against Debtor in  
13 any Motion to Expunge and leave of this Court to file such award as an administrative or other  
14 claim in this case and regardless of any Bar Date in effect.

15 3. That the order provide that Debtor is barred from any further act to cloud title to or  
16 claim an interest in the Property;

17 4. That the order be effective immediately, notwithstanding Bankruptcy Rule  
18 4001(a)(3), in this action, and any conversions to any other chapter of the United States Bankruptcy  
19 Code;

20 5. For such further and other relief that the court deems proper.

21 DATED: October 3, 2014

LAW OFFICES OF MARK J. ROMEO

22 By /s/ Mark J. Romeo

23 MARK J. ROMEO

Attorneys for Movant

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**EXHIBIT LIST TO MOTION**

1. Amended Schedule B
2. Order For Relief From Stay June 24, 2014, In Re Waukeen McCoy No. 14-30381
3. Trustee's Deed Upon Sale
4. Notice of Pendancy [sic] of Action